IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1052

L. T. WALLACE, as Director of Food and Agriculture of the State of California, and M. H. Becker, as Director of the County of Los Angeles, California, Department of Weights and Measures,

Petitioners,

v

THE RATH PACKING COMPANY, a corporation,

Respondent.

BRIEF OF THE STATES OF MICHIGAN, ARKANSAS, OKLAHOMA, OREGON, TEXAS AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER L. T. WALLACE

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JURISDICTIONAL STATEMENT

This brief, amicus curiae, is respectfully submitted by the states of Michigan, Arkansas, Oklahoma, Oregon, Texas and West Virginia pursuant to Rule 42(4) of this Court.

The states and organizations listed in footnote 1 accept and agree with the reasons for granting the writ expressed herein.[1]

INTEREST OF AMICI CURIAE

The People of the State of Michigan comprise more than 8,875,000 residents, as of the 1970 census. This Michigan population has purchased and consumed in 1974 some 1,331,250,000 pounds of meats.

To protect our citizens from adulterated and short weight meat products, the State of Michigan has long had a state weights and measures law. We have adopted the weights and measures statute, 1964 PA 283, as amended; MCLA 290.601, *et seq*; MSA 12.1081(1), *et seq*. This law is patterned after and is in conformity with the efforts aimed at achieving uniformity of such statutes among the several states by the National Bureau of Standards, United States Department of Commerce.

Those states, including the State of Michigan, that have adopted the model act find themselves confronted by a decision of the United States Court of Appeals for the Ninth Circuit that their statutes, promulgated at federal urging, which provide for methods of inspection for determining what is adulterated meat and whether the weight of same is accurate, are preempted by 9 CFR 317.2(h)(2).

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[1]
The following jurisdictions and organizations support granting of the writ expressed in this case.

States: Jim Guy Tucker, Attorney General of Arkansas; Larry Derryberry, Attorney General of Oklahoma; Lee Johnson, Attorney General of Oregon; John L. Hill, Attorney General of Texas; Chauncey H. Browning, Attorney General of West Virginia.

Organizations: The National Conference on Weights and Measures; The Coalition for Economic Survival of Los Angeles, California; *Consumer News Letter*, Arcadia, California.

The State of Michigan and other states are concerned that unless the Court of Appeals decision is reversed the economic impact upon wholesalers and retailers, who are protected by the state weights and measures laws, will be substantial. Likewise, because of lack of enforcement of state weights and measures laws, packers and retailers would be subjected to unfair trade practices. Somewhat more remote would be the negative effect upon any incentive to develop modern packing equipment to insure against weight loss.

The States are concerned because enforcement of this decision will mean that each inspector at the local level must be familiar with what are at the moment good manufacturing and distribution practices prescribed in the federal regulations and whether the adulteration or inaccuracy of weight or contents is due to an impermissible variance from such practices. As a consequence, rather than inspecting, reweighing and remeasuring 88,879 meat packages and finding 10,537 that had to be rejected in 1974 (on a sample lot basis), the state and local inspectors would be unable to determine violations at all.

With this in mind, we are concerned that the longstanding and well-settled decision of this court in *Patapsco Guano Co* v *North Carolina*, 171 US 345; 18 S Ct 862; 43 L Ed 191 (1897) which held that local laws for the inspection and regulation of weights and measures are a competent exercise of the police power of the states, will be nullified.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Ninth Circuit has raised a significant problem concerning the relations between federal and state jurisdiction. The decision has ordained that a federal regulation adopted purportedly under the authority of the Federal Wholesome Meat Act can

essentially and pragmatically destroy the effectiveness of state power to insure to its citizens protection against unwholesome meats and packages of meat that are other than the quantity represented.

The Court of Appeals, in determining that Congress intended a preemption of state methods of inspection for false weights and measures of meat products, has in effect nullified traditionally valid exercises of state police power and negated the intent of Congress as expressed in 21 USC 678. It states:

> Non-Federal jurisdiction of Federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; record-keeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters.
>
> Requirements within the scope of the chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under

> this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

In an apparent attempt to implement the Wholesome Meat Act, the Secretary of Agriculture promulgated 9 CFR 317.2(h)(2), which provides:

> "The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packaging substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

Michigan, like many other states, has adopted a weights and measures law which is patterned after a model act developed by the National Bureau of Standards, United States Department of Commerce, pursuant to its statutory responsibility for cooperation with the states in securing uniformity in weights and measures laws and methods of inspection. See, 15 USC 272(f)(5).

An essential ingredient of that statute provides that state

enforcement officials may employ recognized sampling procedures ". . . under which the compliance of a given lot of packages will be determined on the basis of the result obtained on a sample selected from and representative of such lot . . ." 1964 PA 283, as amended; MCLA 290.612; MSA 12.1081(12).

To effectuate these sampling procedures, the State of Michigan has adopted the National Bureau of Standards' Handbook 67, entitled "Checking Prepackaged Commodities; a Manual for Weights and Measures Officials."

Both Handbook 67 and the Michigan provision for inspecting by sampling procedures are, according to the Court of Appeals logic, in direct conflict with 9 CFR 317.2(h)(2). This federal regulation does not permit sampling by lot, but expressly requires inspections to be performed whereby the state official must be fully aware of the vagaries of good manufacturing practices and good distribution practices for literally hundreds of meat products, some of which may have been packaged or manufactured in foreign countries. Indeed, under the federal regulations a state official cannot be expected to be knowledgeable, when he discovers a meat package that is short weight or adulterated, to know the reason for same, i.e., whether it is due to failure to conform to good manufacturing practices or good distribution practices or for some other unknown reason.

The Court of Appeals has imposed an impossible burden upon the local official to know in each and every case what was or was not a good manufacturing or distribution practice and whether the meat product is short weight or adulterated because that particular manufacturer or distributor failed to comply with such practices. Thus, this variance and conflict between one federal regulation and state law adopted at the behest of another federal executive agency will simply result in states and local communities not engaging in the inspection

of weights and measures. The Court has effectively stripped the ultimate consumer of needed and necessary protection.

Superimposed over all of this is the anomaly that the National Bureau of Standards, United States Department of Commerce, has been for several years, pursuant to the intent of Congress, cooperating with the states in securing uniformity in weights and measures laws and methods of inspection. It is therefore absurd that one agency of the executive branch advocates and assists in the adoption of uniform local laws providing for certain methods of inspection, while another agency of the executive branch, the Department of Agriculture, circumvents, frustrates, and hinders this intent by promulgating a rule which the Court of Appeals interprets to suppress and eliminate uniform local law in favor of one national law on methods of inspection.

The State of Michigan says that the Court of Appeals was in error in concluding that the Congress intended to suppress and eliminate uniformity among the several states in methods of inspection. The several states in cooperation with the National Bureau of Standards have elected to adopt a uniform law authorizing sampling methods of inspection. We assert that Congress could not have intended, by adopting section 678 of the Wholesome Meat Act, to defeat state efforts by the ill-advised adoption of 9 CFR 317.2(h)(2).

It is with these circumstances in mind and in consideration of the nature of our system of government that the principle expressed by this Court in *Florida Lime & Avocado Growers, Inc* v *Paul*, 373 US 132; 83 S Ct 1210; 10 L Ed 2d 248 (1963) be reemphasized. This Court said at page 142:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the

absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. • • •." (p 142)

A review of section 678 and of the legislative history of the Wholesome Meat Act as a whole demonstrates that there was no congressional intent to preempt the operation of state weights and measures laws insofar as they provide for a system and means of inspection and enforcement. The operative language of section 678 specifically permits the states to exercise concurrent jurisdiction with respect to inspection and take such other action consistent with the act and with respect to other matters regulated under the act.

Prohibitions upon the states from imposing "requirements" with respect to labeling or packaging, for example, are wholly different from exercising and performing the needed inspection at the shelf level to be certain the consumer is not subjected to adulterated or misbranded meat products. The Court of Appeals has actually concluded that state inspection programs utilizing the sampling methods are the imposition of a requirement, rather than an accepted procedure respecting packaging and labeling, when in fact they are not.

When an examination of the various pertinent portions of the legislative history is undertaken, one inescapable conclusion is drawn; that Congress intended that wholesome meat would be introduced into the stream of commerce – nothing less!

"This legislation has one basic and fundamental objective – to insure the wholesomeness and cleanliness of the entire meat supply in these United States. It is imperative that our meat inspection laws in this country be strong enough to guarantee that not even 1 pound of unclean

or unwholesome meat can enter into channels of human consumption."

Representative May in the *Congressional Record*, 10/31/67, p 30512.

"They will know that this meat, in 99 percent of the cases, will have been slaughtered under sanitary conditions and was not subject to terrible unsanitary conditions – broken-down toilets, overflowing on the floor; hair being ground up in hamburger or sausage; diseased cows slaughtered, with the diseased portion trimmed out and the remainder sent to the market unidentified as to quality, and unidentified, in more important measure, as to the lack of quality."

Senator Monroney, *Congressional Record*, 10/31/67, p 35358.

"A current Department of Agriculture survey of packing and processing facilities in non-Federal inspected meat plants shows the existence of appalling conditions. For example the report shows that contaminated meat, meat from diseased animals, hides, carcasses, animal entrails, flies, and other absolutely unsanitary and thoroughly disgusting items find their way into processed meats. The existence of such conditions is deplorable. The passage of legislation that will not eliminate all the unsanitary conditions and assure the public the highest quality of products is not meeting our full responsibility."

Representative Feighnan, *Congressional Record*, 10/31/67, p 30517.

"I want to show you what the Federal inspectors have rejected in Federal plants. First, an animal which has about a gallon of yellow pus in a joint. That animal was rejected by a Federal inspector in a Federal plant. Here

is a cow with a cancerous eye that was rejected in a Federally inspected plant. It is enough to turn your stomach. What happens in a non-federally inspected plant! Who knows! But we do know, and anybody who is honest will admit it; that the major channel of filthy meat in this country, such as it exists, goes through non-inspected plants, nonfederally inspected plants."

Representative Foley, *Congressional Record*, 10/31/67, p 30523.

These remarks are illustrative of the congressional purpose of insuring that the United States would have an inspection system designed to insure that 100% of the meat distributed in commerce would be clean. There is no substantial evidence that Congress envisioned setting up a national standard of weights and measures or inspection at the local or shelf level of commerce which would be binding on the states. Senator Montoya, one of the Senate sponsors of the bill, stated that:

"A Federal-State relationship is maintained [by the bill] that closes the loopholes without infringing significantly upon responsibilities and agencies of the respective states."

Congressional Record, 10/31/67, p 35354.

This observation completely refutes the conclusion of the Court of Appeals and the position advocated by Rath, for to accept their view would result in a very significant infringement on state responsibilities in weights and measures. The federal government would be telling the states that they could no longer engage in an effective on-site retail shelf level inspection for adulterated and short weight meats.

If Congress had meant to preempt state laws, appropriate language would have been used to clearly express this objective. This they did not do, but instead, recognized that this form of enforcement and regulation is a traditional state function best left to the states with the recognition that the states are being encouraged to adopt uniform weights and measures laws.

As illustrative of Congress expressing such preemptive intent, see the Federal Tobacco Inspection Act, 7 USC 511a, *et seq*, where Congress expressly declared that "uniform standards of classification and inspection" are necessary and imperative "for the protection of producers and others engaged in commerce and the public interest therein." See *Campbell* v *Hussey*, 368 US 297; 82 S Ct 327; 7 L Ed 2d 299 (1961).

The regulation of the sale of foodstuffs in order to insure the health and well-being of its citizens is clearly within the traditional police power of the state. *Plumley* v *Massachusetts*, 155 US 461; 15 S Ct 154; 39 L Ed 223 (1899); *Florida Lime & Avocado Growers, Inc* v *Paul, supra; Cloverleaf Butter Co* v *Patterson*, 315 US 148; 62 S Ct 491; 82 L Ed 754 (1942). Nothing in the committee hearings, committee reports or floor debates on the Wholesome Meat Act evidences any intent on the part of Congress to preempt this traditional state power. The congressional emphasis was on cooperation, not preemption. In addition, Congress sought to modernize previous federal laws in the area of meat inspection. Part of this modernization, however, was not the preemption of state law when there had been no preemption under the old law.

It is well recognized that Congress will not preempt any state powers without debate. This legislative body contains many individuals who are always ready to do battle on behalf of state power. If the Wholesome Meat Act embodied the position taken by the Court of Appeals and *Rath*, those men and women in Congress would surely have made themselves

heard. Their very silence is eloquent testimony of the congressional intent.

In direct contrast, there was considerable debate concerning the provisions of Title III of the Wholesome Meat Act, which establishes the system of inspection of meat-processing facilities. Congress was clearly concerned over who should have responsibility for the inspection of intrastate meat processors. As finally enacted, the act left that responsibility with the states, provided they developed a program at least equal to that of the federal government. It is highly unlikely that Congress would be so protective of state powers in the area of inspection and at the same time silently take them away.

In essence, Congress passed the Wholesome Meat Act to improve the products available to consumers, yet the *Rath* holding would preempt a state law which was designed to permit the states authority in inspecting at the consumer level for the meat products that are unwholesome or short-weight. Congress should not be held to operate at such cross-purposes, especially based on the legislative evidence available in this case. The evidence is contained in the House and Senate reports on section 408, later codified as 21 USC 678.

The summaries of the section contained in House Report No. 653 and Senate Report No. 799 are identical. They provide as follows at pages 27 and 18, respectively:

> Section 408 would exclude States, Territories, and the District of Columbia from regulating operations *at plants* inspected under Title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with Title I of this act, but would permit them to impose recordkeeping and related requirements with respect to

> such plants if consistent with federal requirements and to impose requirements consistent with the federal provisions as to other matters regulated under the Act. (Emphasis added.) *U.S. Code Congressional and Administrative News,* Volume 2, 1967, p 2207.

Two other quotations from the debates might be helpful. Though the exchange occurred during the discussion of the Conference Committee report, which dealt largely with the proper role of federal inspection of intrastate processing, the discussion between Congressman Gerald Ford of Michigan (now President) and Representative Page Belcher of Oklahoma contains interesting language. At page 35151 of 113 Congressional Record (1967), the following colloquy occurs:

Mr. Gerald R. Ford. Within the past year, in my part of the state of Michigan, we have had a number of serious meat scandals, even under good state legislation. Those accused were prosecuted, both individuals and corporations. Under the state law, a number of convictions were achieved.

I believe we have an excellent state law. As I indicated, when violations of law did occur, convictions were obtained.

Under the conference report, can the State of Michigan continue its program and can it qualify for fifty-percent funding by the federal government?

Mr. Belcher. The fact of the matter is that we invite the state of Michigan and the states of Texas, Oklahoma, Kansas, or Nebraska to do the same thing that Michigan did, and the federal government will pay half of the bill.

I hope – and I believe all the conferees hope – every

> state will take over the responsibility, together with the federal government, of protecting the people. . . .

President Ford, at least, was led to believe that the State of Michigan could continue its meat inspection program, both of intrastate and interstate meats.

There is nothing to indicate that the members of Congress thought that the bill would do any more than prevent states from burdening federally inspected meats before they entered the stream of interstate commerce, without affecting the traditional right of the states to regulate with regard to the meats to be offered for sale to its consumers. A good indication of the congressional view of the roles of the federal government and of the states is found in the comments of Congressman Pirnie, at page 30527 of 113 Congressional Record (1967):

> An editorial in this morning's Washington Post stated clearly what I believe is the mission before us. In referring to the type of legislation needed, the editorial said:
>
> 'In our view, there are two major objectives to be sought: (1) The elimination of every pound of unclean or unwholesome meat from the market; (2) Accomplishment of this objective within the framework of our federal system, which often calls for federal aid to help the states perform their local functions instead of mere absorption of those functions by an overextended federal bureaucracy.'
>
> My own state of New York has a meaningful meat inspection program, and has had it for some time; however, there are several states without such a program. In these states, the consumer has no guarantee whatsoever that any meat products processed, packed, and distributed solely within the borders of a state are wholesome and meet

> certain minimum health and quality requirements. This meat is not subject to federal inspection because it is not involved in interstate commerce.
>
> The solution to the problem, in my view, is not for the federal government to take over all meat inspection, permitting the states to abandon their responsibilities in this area. Nor should we turn our backs to the matter and let the states fend for themselves. The answer lies somewhere in the middle.
>
> As the committee suggests, let us establish a federal-state partnership. We hear so frequently the term 'creative federalism', let us test its practicality in this regard. By working with the states and agreeing to share the cost and assist in the development of programs on the local level – programs with teeth in them – we will at once make significant progress toward the eventual attainment of the worthy goals outlined in the Post editorial.

Other indicative comments include those of Congressman Latta of Ohio, at page 30509 of 113 Congressional Record (1967):

> The proposed legislation would enhance the state by providing for federal cooperation with appropriate state agencies in developing and administering state meat inspection programs.

At page 30516 of 113 Congressional Record (1961), Congressman Mayne of Iowa remarks:

> The bill . . . is a good bill which will do much to improve meat inspection throughout the United States. Moreover, it will permit state and local governments to perform a

necessary role in this important function which is so vital to the health of our country.

I believe there is a proper role for the state governments and local governments under our federal system and that inspection of meat is a function which properly falls within their jurisdiction.

The current state of the law is that if the Court of Appeals decision is not reviewed, the states are denied their historic right to protect their citizens within their borders in this area. Thus, the consumer when he brings home the bacon will not know whether it is adulterated or of the quantity represented therein.

Respectfully submitted,

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